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No. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1996

In Re: ARGEREY CONSTANT

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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33 pp

QUESTIONS PRESENTED

1. Are federal patent rights insulated from local rules and state laws?

2. Shall courts explicitly determine jurisdictional issues when challenged?

3. Shall courts explicitly state why remaining issues are moot in summary judgement dispositions?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all persons against whom relief is sought is as follows: BEEZER, KOZINSKI and KLEINFELD Circuit Judges, Ninth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

PETITION FOR WRIT OF MANDAMUS

Non-debtor spouse Argerey Constant respectfully prays that a writ of mandamus issue to vacate the judgement of the Ninth Circuit court of appeals, order the appeal court to actually litigate and expressly decide the jurisdictional questions raised by appellants in the bankruptcy court and Ninth Circuit appeal courts, and order the appeal court to transfer appeal to the Federal Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit court of appeals appear in APPENDIX A and is unpublished.

JURISDICTION

The date on which the Ninth Circuit court of appeals decided my case was 23 October, 1996. No petition for rehearing was permitted. APP. A.

The jurisdiction of this Court is invoked under 28 USC 1651 and Rule 20 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3(c) and (d); bankruptcy statutes 11 USC 363(e) and (f)(1), 11 USC 544(b); jurisdictional statutes 28 USC 158(b) and (d), 28 USC 1291, 28 USC 1294, 28 USC 1295(a)(1), 28 USC 1334(e) , 28 USC 1338(a), patent statute 35 USC 261; and Fifth Amendment are set forth in the text.

STATEMENT OF THE CASE

In the bankruptcy court appellants[1] objected to the court order approving sale of twenty-two (22) patents on grounds, first, patent rights of non-debtor spouse are protected under the Patent Code, second, patent rights of non-debtor spouse are protected under the Bankruptcy Code and, third, the bankruptcy court lacks jurisdiction over patent rights of non-debtor spouse.

The bankruptcy court approved the sale of patents and appellants appealed to the bankruptcy appellate panel. The sale was made after appellants filed their notice of appeal in the bankruptcy appellate panel. On the trustee's motion, supported by a declaration of sale, the bankruptcy appellate panel dismissed the appeal on grounds "appeal moot where sale of property completed and appellants failed to obtain stay".

Appellants appealed directing their appeals to the Federal Circuit. Appeals were sent by the bankruptcy clerk to the Ninth Circuit appeal court in violation of FRAP 3(d)[2]. The

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1 Case No. 96-56122 appeal by debtor James Constant; Case No. 96-56123 appeal by non-debtor spouse Argerey Constant lienholder and owner of patents at bar. Debtor has filed a Petition for Writ of Mandamus copending in this Court. Case No. ____.

2 Rederal Rule of Appelate Procedure 3

(c) ... A notice of appeal ... must name the court to which the appeal is taken. ...

(d) ... The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. ...

Ninth Circuit appeal court denied appellant's motion to transfer appeal to the Federal Circuit and summarily affirmed the bankruptcy appellate panel's order dismissing my appeal as moot citing local rules. App.A.

I join in debtor's copending Petition for Writ of Mandamus.

REASONS FOR GRANTING THE PETITION

I. The Alleged Sale is a Sham Sale

A. The Alleged Sale Was Not Part of The Record On Appeal

1. By a declaration executed on 18 September, 1995, the alleged sale was made on 11 July, 1995, S-500[3] #8 Decl. Stone #12, after 22 June, 1995 the date I filed my notice of appeal in the bankruptcy appellate panel (BAP) from the bankruptcy court's order to sell patents, S-500 #1, thus depriving the bankruptcy court of all jurisdiction to sell patents.

2. The alleged sale of patents was not made part of the record on appeal to the BAP. The issue of mootness was not designated in the record on appeal to the BAP. The sole issue on appeal in the BAP was the bankruptcy court's order approving trustee's sale of patents, J-242. The BAP's dismissal was made in violation of the designated record before that court.

3. In view of FRBP 8006[4], the record on appeal con-

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3 Letters followed by numbers refer to documents in my or in debtor's APPENDICES attached to briefs on appeal in the Ninth Circuit.

4 Rederal Rule of Appelate Procedure 8006.

stitutes "That which appellant and appellee designate ..." (underlines added). Collier on Bankruptcy 15th ed. Vol. 8 - pages 8006-1 and 8006-4. There is no evidence in designations, R-428, J-166, that the trustee designated its declaration of sale alleging that a sale was made on 11 July, 1995. The fact is that the document alleging sale of patents was never made part of the record on appeal. Thus, while the trustee's "failure to designate" is based on statute FRBP 8006, appellant's "failure to obtain stay" is based on local rules cited by the Ninth Circuit in App. A.

4. FRBP 8006 explicitly provides that the record on appeal to the bankruptcy appellate panel include those items specifically designated. See Collier, supra at page 8006-4. FRBP 8006, therefore, explicitly bars the trustee from introducing its declaration of sale on appeal because it was not specifically designated by the trustee in its designation J-166.

5. The very grounds on which the bankruptcy panel dismissed, R-421, and the Ninth Circuit affirmed, App. A, were based on evidence and issues which were not part of the designated record on appeal. The sole issues in the present appeal were the patent issues set forth, in designations. The trustee's motion in the BAP to dismiss the appeal on grounds "appeal moot where sale of property completed and appellants failed to obtain stay", based on issues not designated, was frivolous.

6. It is clear that neither the bankruptcy appellate panel or the Ninth Circuit appeal court had jurisdiction over the trustee's declaration alleging sale which never became

part of the record on appeal.

7. The trustee cited no authority that would allow his declaration alleging sale to be made part of the record on appeal.

B. The Alleged Sale Was Made After Appeal Deprived Trustee of Court's Authorization To Sell Patents

1. The bankruptcy court was deprived of all jurisdiction to sell patents on 22 June, 1995, the date my notice of appeal to the bankruptcy appellate panel was filed, S-500 #1. As of that date, the appealed order to sell patents, J-242, was no longer under the jurisdiction of the bankruptcy court.

2. In its Notice of Motion For Order Approving Sale, the trustee provided notice that "at the conclusion of the hearing on the motion" he would "cause the sale of patents", J-193 last par. The Order Approving Sale Of Patents was entered on 3 June, 1995. Had the trustee made the alleged sale before 22 June, 1995, the date the appeal was filed, he could have designated the sale document as part of the record on appeal and he would be within the bankruptcy court's order authorization to sell patents. As it stands, the trustee made the alleged sale on 11 July, 1996 after the notice of appeal was filed thus preventing him from designating the sale document as part of the record on appeal and preventing him from selling patents after the order approving sale of patent, J-242, was removed to the bankruptcy appellate panel for review.

3. The trustee's failure to designate the sale document and his failure to timely sell patents before the appeal

was filed are failures for which the Ninth Circuit should have applied the same justice it applied to appellant's "failure to obtain a stay" when, in fact, the notice of appeal is evidence of appellant's having obtained a stay, in the authorization to sell patents, J-242.

4. The trustee cited no authority that would allow his alleged sale to be made after the authorizing order approving sale, J-242, was removed from the bankruptcy court's jurisdiction by my appeal to the bankruptcy appellate panel.

C. Mootness Issue Decided Does Not Bar Review of Remaining Live Issues

1. The mootness issue decided is but one issue on appeal. The remaining live issues, see infra, supply the constitutional requirement of a case or controversy. Powell v. McCormack (1969) 395 US 486, 21 LEd2d 491, 89 SCt 1944.

2. Moreover, failure to obtain a stay does not render an appeal moot when federal statute 35 USC 261 would permit the transaction to be set aside. In re Mann 907 F2d 923, 23 CBC2d 608 (CA9 1990) (when state law would permit transaction to be set aside).

II. Federal Patent Rights Are Insulated from Local Rules And State Laws

If non-debtor spouse has clearly pre-existing interest in property, that interest does not become part of debtor's estate and such interest is not defeated., Re Butts (BC DC ND 1985) 46 BR 292.

A. Federal Patent Rights of Non-Debtor Spouse Are Not Defeated By Local Rules and State Law Procedures

1. The Ninth Circuit cites rules to dismiss my appeal: Ewell v. Diebert, 958 F2d 276,278 (CA9 1992) (appeal moot where sale of property completed and appellants failed to obtain stay); Casady v. Bucher, 621 F2d 984,986-87 (CA9 1990) (appeal moot where property sold to non-party). Neither rule cited by the Ninth Circuit involves patent rights.

2. My federal patent rights cannot be defeated by local rules cited by the Ninth Circuit's order, App. A, affirming the bankruptcy appellate panel's dismissal of my appeal. Davis v. Wechsler 263 US 22,24.

3. Federal law insulates patents from state law procedures. Re Peregrine (Bkrtcy CD Cal 1990) 116 BR 194.

B. Patent Rights Of Non-Debtor Spouse Are Protected Under The Patent Code

1. My patent rights are protected under the patent code. 35 USC 261[5]. Thus, the alleged sale of patents is subsequent to my recorded lien and ownership rights of patents.

2. The alleged sale is a sham sale because patent ownership rights are established under patent statute 35 USC

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5 35 USC 261 (Ownership, assignment, and lien interests in patents)

"An assignment ... shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark office within three months from the date or prior to the date of such subsequent purchase or mortgage" (underline added)

261 not by "operation of law" based on local rules and state laws. An interest in a patent must be perfected by filing in the Patent Office. Re Peregrine (Bkrtcy CD Cal. 1990) 116 BR 194,204. Neither the trustee or the alleged non-party purchaser have established interests in patents, by filing in the Patent Office pursuant to 35 USC 261, which have priority over my patent rights. The alleged sale is void under 35 USC 261 which can be invoked at "any time".

3. The substantive issues in this case are my claim of lien on patents pursuant to 35 USC 261 and to adequate protection of my lien interest under 11 USC 363 (e); my claim of ownership of patents pursuant to 35 USC 261; my claim that the lower courts lack jurisdiction under 28 USC 1334(e) over patents or, if jurisdiction exists under 28 USC 1334 (e), the courts lack jurisdiction to void, assign, and sell patents under 11 USC 363(f)(1), 11 USC 544(b) and inapplicable state laws; my claim that judgements in related adversary cases relied on by the trustee and by the Ninth Circuit's prefiling order to reject debtor's appeal were obtained in the clear lack of all jurisdiction of the subject matter; and my claim that the Ninth Circuit lacks jurisdiction to hear my lien, ownership, and jurisdictional claims each of which arises under patent statute 35 USC 261.

My Lien On Patents

4. I am the owner of a lien on patents at bar recorded in the Patent Office pursuant to 35 USC 261 which governs the ownership, assignment and liens on patents, A-1. 37 CFR 1.331(b) (recording of liens).

5. My lien, A-1, has never been the subject of litigation in the courts, below or in any way involved in this bankruptcy case and appears only as my claim for adequate protection and protection as a property right which the lower courts failed to provide to me[6].

6. My security interest lien on patents is a property right protected by the 5th Amendment[7]. Re George Ruggiere (CA Fla 1984) 727 F2d 1017.

7. My lien interest can be enforced, independently, as a separate action under 35 USC 261 against.any subsequent purchaser including the trustee or its purchaser.

8. The lien, which inter alia covers the patents at bar, is for "$295,000 plus all income from said patents". Under 35 USC 261 my lien has priority over any subsequent recording in the Patent Office by a bona fide purchaser. Accordingly, I have an independent cause of action against any subsequent purchaser. Covell v. Heyman 111 US 176, 28 LEd 390, 4 SCt 355.

My Ownership of Patents

9. I am also the owner of patents by assignment recorded in the Patent Office pursuant to 35 USC 261, I-158.

10. The trustee claims "ownership" of patents by

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6 In view of my lien on patents, A-1, the bankruptcy court's order approving the sale of pattents erroneously states "there are no known encumbrances on patents", J-244 #4.

7 Amendment V United States Constitution

"No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

"operation of law", based on state law proceedures for voiding property assignments, and has obtained an order to sell patents, J-242. The trustee also claims that he has sold patents to creditor Advanced Microdevices, Inc. (AMD) and that AMD is now the "owner" of patents. The trustee further claims that the "ownership" of patents by AMD moots my appeal and has obtained orders dismissing my appeal as moot, R-421,R-427, App. A.

11. The trustee's and purchaser AMD's claims of "ownership" of patents are not evidenced by perfected recordings in the Patent Office. Re Peregrine (Bkrtcy CD Cal. 1990) 116 BR 194, 204. Absent the perfection of their interests, by filing in the Patent Office under 35 USC 261, the sale of patents is a sham sale.

12. Even if the trustee or AMD can establish ownership of patents (which they cannot), by filing in the Patent office, they would be subsequent purchasers who cannot defeat my lien, A-1, or my ownership, I-158, of patents.

13. The trustee or AMD, in order to qualify for protection under the last paragraph of 35 USC 261, under which the assignment of interest in patent is void as against any subsequent purchaser unless recorded in the Patent office within three months from its date or prior to date of such subsequent purchase, must give valuable consideration so that it can, as matter of law, claim record reliance as premise upon which purchase was made, and must take without notice of any prior assignment. Film Tec Corp. v. Allied Signal, Inc. (CAFC 1991) 19 USPQ2d 1508.

14. Neither the trustee or his purchaser AMD can make an assignment of interest under the last paragraph of 35 USC 261, which gives me, the priority lienholder and owner of patents, valuable consideration so that it can, as matter of law, claim record reliance as premise upon which purchase was made. And, the trustee and his purchaser are clearly on notice of my priority lien and ownership of patents.

15. The trustee and AMD are not bona fide purchasers or mortgagees of patents under 35 USC 261 and therefore are subject to my prior lien and ownership interests. Re Mellor (CA9 1984) 734 F2d 1396,1401 footnote 4.

C. Patent Interests Of Non-Debtor Spouse Are Protected Under The Bankruptcy Code

1. My patent rights are protected under the bankruptcy code. 11 USC 363(e)[8]. Thus, my lien interest can be invoked at "any time" regardless of the Ninth Circuit's order, App. A, affirming the bankruptcy appellate panel's decision.

2. The bankruptcy court's order to sell patents, J-242, does not provide me with the mandatory adequate protection pursuant to 11 USC 363(e) for my lien interest in patents, A-1.

3. My lien has priority over the trustee's and AMD's alleged "ownership" of patents which can only be perfected

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8 11 USC 363(e) (Adequate protection of Interests in Property)

"Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest" (underline added).

by a subsequent recording in the Patent Office under 35 USC 261. An interest in a patent must be perfected by filing in the Patent Office. Re Peregrine (Bkrtcy CD Cal. 1990) 116 BR 194,204. The trustee and AMD are subsequent purchasers under 35 USC 261.

4. If adequate protection of my interest cannot be offered then the proposed sale must be conditioned to provide adequate protection, and if it cannot be conditioned it must be prohibited, For citations see Collier on Bankruptcy 15th ed. Vol. 4 Chapter 363-30 footnote 3a (many citations). To protect my property right, the order to sell patents would have to be made on condition that the sale price is at least equal to $295,000 and that "$295,000 plus all income from said patents" shall be paid to me to discharge my lien. Since this condition cannot be offered, the sale must be prohibited.

III. Bankruptcy Courts Lack Jurisdiction over Patent Rights Of Non-Debtor Spouse

1. Federal patent rights cannot be defeated in the. bankruptcy courts by using local rules and state law proceedures to cancel my patent lien and ownership rights established under patent statute 35 USC 261. Re Peregrine (Bkrtcy CD Cal. 1990) 116 BR 194,204.

2. Under 28 USC 1334(e) the courts below lack jurisdiction over patents because I, not the debtor, was the owner of patents before debtor filed his petition for bankruptcy, as evidenced by my recorded assignment in the Patent Office pursuant to 35 USC 261, I-158.

3. Under 11 USC 363(f)(1), 11 USC 544(b) and

applicable non-bankruptcy statute 35 USC 261 the courts below lack jurisdiction to void, assign and sell patents.

4. Under cited authority[9] the judgements in related adversary cases relied on by the trustee and by the Ninth Circuit's pre-filing order to reject debtor's appeal were obtained in the clear lack of jurisdiction of the subject matter.

5. The Ninth Circuit's refusal to order the clerk of the Court to forward appellant's appeals to the Federal Circuit, is an usurpation of jurisdictional powers in violation of FRAP 3(d).

6. Lack of jurisdiction can be brought up at any time. D-27 (Part A.).

A. Bankruptcy Court (BCT)

1. The order to sell patents states that its jurisdiction to sell patents is pursuant to 28 USC 1334(d), J-245 #8. However, the BCT's proper jurisdiction is under 28 USC 1334(e) which grants the District Court (DCT) exclusive jurisdiction of all of debtor's property, wherever located[10].

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9 See debtor's brief on appeal in the Ninth Circuit at page 2 paragraph 7 citing Christiansen v. Colt Industries (1988) SCt 2166, 100 LEd2d 811; Cardinal Chemical Co. v. Morton International, Inc. US SCt, 920114, 113 SCt 1976, vaclg and remg 22:1231, 26 USPQ 2d 1721; Simmons Fastener Corp. v. Illinois Tool Works, Inc. (CAFC 1984) 739 F2d 1573, 222 USPQ 744.

10 28 USC 1334 (Jurisdiction over property in bankruptcy cases and proceedings)

"(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate" (underline added).

Here, 28 USC 1334(e) is inapplicable because debtor was not the record owner of patents in the Patent Office under 35 USC 261, which governs the ownership and assignment of patents, at the time his petition for bankruptcy was filed. The ownership and assignment rights of patents are established by recording in the Patent Office pursuant to 35 USC 261. An interest in a patent must be perfected by filing in the Patent Office. Re Peregrine (Bkrtcy CD Cal. 1990) 116 BR 194,204. I was the record owner of patents under debtor's assignment, I-158, as well as being the lienholder, A-1. There is no evidence of record in the Patent Office under 35 USC 261 that would establish debtor as the record owner of patents and thus establish the DCT's jurisdiction over patents under 28 USC 1334(e). Even assuming arguendo that the trustee and purchaser AMD could record their court ordered assignment and sale of patents in the Patent office pursuant to 35 USC 261 (which they cannot because they are not bona fide purchasers) that recording would be subsequent to my assignment, I-158, and lien, A-1, and thus having no effect on my lien on and ownership of patents.

2. In connection with the judgement voiding the assignment of debtor's patents to me, J-170, the findings of fact state that the cause of action is pursuant to 11 USC 544(b) and California state laws, M-402. However, the BCT's jurisdiction over patents is pursuant to 28 USC 1334(e) which is inapplicable for the reasons given in the previous paragraph.

*[11] 3. The BCT's jurisdiction to void, assign, and sell patents is further prescribed by 11 USC 544 (b) and 11 USC 36 (f)(1) and the applicable nonbankruptcy law thereunder, here patent statute 35 USC 261 which governs the ownership and assignment of patents. Moreover, creditors, and the trustee who filled their shoes, had no rights to my patents under 35 USC 261 before debtor's petition for bankruptcy was filed.

* 4. The Bankruptcy Code calls for the application of nonbankruptcy "applicable law". 11 USC 363(f)(1); 11 USC 544 (b)[12]. For patents, the applicable law is nonbankruptcy patent statute 35 USC 261 which governs the ownership and assignment of patents. Accordingly, it is not the Bankruptcy Code alone, but the applicable nonbankruptcy patent law

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11 An asterisk at the beginning of a numbered paragraph indicates that the text in the paragraph assumes arguendo that the BCT had jurisdiotion over patents pursuant to 28 USC 1334(e). This jurisdiction was challenged by appellants. See previous two paragraphs.

12 11 USC 363(f)(1) (Sales Subject to applicable nonbankruptcy law)

"The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if **(1) applicable nonbankruptcy law** permits sale of such property free and clear of such interest".

11 USC 544(b) (Voidance of transfers subject to applicable nonbankruptcy law)

"The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under **applicable law** by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 of this title".

under the Code that determines the lower court jurisdiction. The lower courts, in the present and related cases, lacked jurisdiction to decide patent matters under inapplicable state law procedures. Federal law insulates patents from state law procedures. Re Peregrine (Bkrtcy CD Cal 1990) 116 BR 194. California state laws relied on by the trustee to recover patents for the estate are inapplicable for establishing ownership and assignment rights of patents.

5. Since the equity in patents is in me, not in the debtor, the BCT had no jurisdiction to sell patents. In Re A. Roth Co. (CA7 1941) 118 F2d 156.

6. Under 35 USC 261 my assigned ownership of patents, I-158, and my lien on patents, A-1, have priority over any subsequent recording by a purchaser in the BCT sale.

B. Bankruptcy Appellate Panel (BAP)

1. The BAP's jurisdiction to hear the appeal was pursuant to 28 USC 158(b)[13] and its jurisdiction over patents was pursuant to 28 USC 1334(e). However, for the reasons discussed in A. supra, the BCT and thus the BAP lacked jurisdiction over patents.

2. The point is, first, the BCT and BAP lacked jurisdiction over patents under 28 USC 1334(e) or, second, if jurisdiction existed under 28 USC 1334(e), they lacked juris-

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13 28 USC 158 (Appeals to Bankruptcy Appellate Panels)

"(b) The judicial council of a circuit shall establish a bankruptcy appellate panel..... (d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgements, orders, and decrees entered under subsections (a) and (b) of this section".

diction under 11 USC 544(b), 11 USC 363(f)(1) and the inapplicable nonbankruptcy state laws and, third, they refused to exercise their original jurisdiction under 28 USC 1338(a)[14] to determine appellant's patent claims. D-27-31, G-117, J-215,225, 0-405.

IV. Ninth Circuit Appeal Court Lacks Jurisdiction Over Patent Matters

1.There has been no explicit determination by the Ninth Circuit of the jurisdictional issues raised by me in the present appeal. Federal appellate court has special obligation to satisfy itself not only of its own jurisdiction, but also the jurisdiction of lower courts in case under review. Bender v. Williamsport Area School District (US 1986) 89 LED2d___, 106 SCt 1326.

2. The Ninth Circuit appeal court lacks jurisdiction to hear and determine the issues of patent liens and ownership raised by appellants under 35 USC 261 in the courts below[15].

3. The Federal Circuit has sole jurisdiction to decide whether a district court has jurisdiction of a case as arising under the patent laws within the meaning of 28 USC 1338. C.R. Bard, Inc. v. Schwartz (CAFC 1983) 716 F2d 874, 219 USPQ 197.

4. The Federal Circuit has jurisdiction under 28 USC 158(d) and under 28 USC 1295(a)(1) that court has exclusive jurisdiction over an appeal from a final decision of a federal

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14 28 USC 1338 (Jurisdiction Over Patent Matters)

"(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents ..."

district court "if the jurisdiction of that court was based, in whole or in part, on" 28 USC 1338(a) which grants the district courts original jurisdiction of any civil action "arising under" any federal statute relating to patents. The present action is a core proceeding, J245 #9, which arises solely under patent statute 35 USC 261. Pursuant to 35 USC 261, I, not debtor, am the record owner of patents under debtor's assignment, I-158, as well as being the lienholder, A-1, both pursuant to 35 USC 261. See appellant's objections to the trustee's motion for Order Approving Sale of Patents, J-215,225.

5. The Ninth Circuit's jurisdiction over appeals is 28 USC 158(d) and 28 USC 1291. However, the Ninth Circuit's jurisdiction to review decisions excludes patent matters. 28 USC 1294. The Ninth Circuit's lack of jurisdiction over

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15 28 USC 1291 (Jurisdiction of Appeals Courts)

"The courts of appeals (other than the Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States .... The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title".

28 USC 1294 (Circuits in which Decisions are Reviewable)

"Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals ...".

28 USC 1295 (Jurisdiction of the United States Court of Appeals for the Federal Circuit)

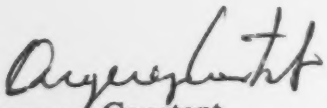
"(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction - (1) of an appeal from a final decision of a district court of the United States, ..., if the jurisdiction of that court was based, in whole or part, on section 1338 of this title ...".

patent matters, and to decide cases solely on affirmative defenses and procedures without hearing claims of complaints, was challenged by debtor in each related adversary case relied on by the trustee and by the Ninth Circuit's pre-filing order to reject debtor's appeal[16]. D-28,29, E-52,58, F-83.

CONCLUSION

My Petition for Writ of mandamus should be granted.

Respectfully submitted



Date: 18 November, 1996

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16 See debtor's co-pending appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 23, 1996

In re: JAMES CONSTANT, Debtor.	Nos.	96-56122 96-56123
JAMES CONSTANT, ARGERY CONSTANT, Apellants, vs. DAVID L. RAY, Appellee.	BAP#	CC-95-1848-BvH
		ORDER

Before: BEEZER, KOZINSKI and KLEINFELD, Circuit Judges

Appellant's motion to vacate this court's September 30, 1996 order is denied. To the extent that appellant seeks reconsideration of the September 30 order, such a motion is precluded by that order. Appeal no. 96-56122 remains closed.

Upon review of the record and appellant's response to the order to show cause in appeal no. 96-56123, this court hereby summarily affirms the Bankruptcy Appellate Panel's June 21, 1996 order dismissing the appeal as moot. See Ewell v. Diebert, 958 F.2d 276, 278 (9th Cir. 1992) (appeal moot where sale of property completed and appellants failed to obtain stay); Casady v. Bucher, 621 F.2d 984, 986-87 (9th Cir. 1980) (appeal moot where property sold to non-party).

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

AFFIRMED.

No. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1996

In Re: ARGERY CONSTANT

PROOF OF SERVICE

I, Argerey Constant, declare that on this date, 18 November, 1996, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR WRIT OF MANDAMUS on each party to the above proceeding and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first class postage pre-paid.

The names and addresses of those served are:

Beezer, Circuit Judge
United States Court of Appeals for the Ninth Circuit
121 Spear Street, PO Box 192939
San Fransisco, California 94119-3939

Kozinski, Circuit Judge
United States Court of Appeals for the Ninth Circuit
121 Spear Street, PO Box 192939
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Kleinfeld, Circuit Judge
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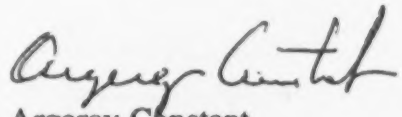
Gordon Stone III
SALTZBURG, RAY & BERGMAN
10960 Wilshire Boulevard, loth Floor
Los Angeles, California 90024-3702

Office of the United States Trustee
300 North Los Angeles Street, Room 3101
Los Angeles, California 90012

James Constant
1603 Danbury Dr
Claremont, CA 91711

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 18 November, 1996



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